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No. 00-1407

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF ELKHART,

Petitioner,

-v-

WILLIAM A. BOOKS and MICHAEL SUETKAMP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In their Brief in Opposition, the respondents fail to answer a fundamental question raised by this petition: how can the same Constitution allow the display of FOE Ten Commandments monuments in Salt Lake City and Denver, while requiring removal of an identical monument in Elkhart, Indiana? The conflict in the lower courts on this issue, the mistaken application of *Stone v. Graham*, 449 U.S. 39 (1980), in the lower courts, and the lower court's resort to a virtually invisible threshold for standing in these cases, all call for this Court's intervention.

I. THE CONFLICT IN THE LOWER COURTS IS REAL AND REQUIRES RESOLUTION BY THIS COURT.

A. *Anderson v. Salt Lake City Corp.* Remains the Law of the Tenth Circuit and is in Direct Conflict With the Seventh Circuit Decision Below.

Faced with a contrary precedent from another circuit on virtually identical facts, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), the respondents attempt to blunt this direct conflict by challenging the continuing precedential value of *Anderson* and by distinguishing it on its facts. The respondents' attempt fails on both counts.

First, *Anderson* remains the law of the Tenth Circuit. The Tenth Circuit panel which decided *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997), expressly declined to overrule *Anderson*. No lawyer arguing a case in the courts of the Tenth Circuit could plausibly argue that *Anderson* does not control a Ten Commandments display case arising in the Tenth Circuit absent some significant factual distinction. As the *Summum* panel itself recognized, *Anderson* continues to be the law of the Tenth Circuit absent en banc reconsideration or a superseding contrary decision of this Court, neither of

which has occurred. *Id.* at n.8.[1]

Respondents fail to distinguish *Anderson* on its facts. Indeed, the facts of *Anderson* underscore the conflict between the Tenth Circuit's and Seventh Circuit's treatment of displays of the same monument.

In *Anderson*, the FOE monument was placed "in a prominent place near the courthouse entrance," *Anderson*, 475 F.2d at 30, was enhanced by government installed and maintained lighting equipment, *id.*, and was "visible to all who enter the courthouse through the main entrance." *Summum*, 130 F.3d at 910. In contrast, the Elkhart monument is situated 46 feet from the main entrance to the Municipal Building, Pet. App. 5a, is not illuminated or maintained by Elkhart, Pet. App. 4a, and is only one part of a three-monument display. *Id.* Hence, in a number of ways the Elkhart display is even less susceptible to an Establishment Clause challenge than the display upheld in *Anderson*.

The conflict between the two cases could not be any clearer. This Court should grant review.

B. There is No Meaningful Factual Distinction Between the Display in Elkhart and That at Issue in *State of Colorado v. Freedom From Religion Foundation.*

Respondents also attempt to explain away the obvious conflict between the decision below and the decision of a state court of last resort which found constitutional Colorado's

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[1]The *Summum* panel's rationale for questioning *Anderson* based on *Stone* is specious and is based on a misreading of *Stone v. Graham*. *See* Point II, *infra*. In addition, the panel's statement that "our decision in *Anderson* has been called into question by the Supreme Court," *id.*, is *dicta* and highly misleading *dicta*, at that. This Court never cited or referred to the *Anderson* case in *Stone v. Graham*.

display of an FOE Ten Commandments monument. *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), *cert. denied* 516 U.S. 1111 (1996). Yet the same factual elements deemed dispositive by the Seventh Circuit panel majority were also present in *Freedom From Religion*, namely, a monument containing the Ten Commandments, prominently displayed on public property, at the seat of government. *Id.* at 1015-16.

Respondents speculate that the Colorado Supreme Court would have reached a different conclusion had the FOE monument in that case "been displayed in front of a governmental building." Opp. at 17. They fail to recognize, however, that the FOE monument in that case was in fact displayed in front of the Denver City-County Building and within the Capitol Complex Grounds. *Freedom From Religion*, 898 P.2d at 1015-16. In contrast to the Elkhart placement, in front of city hall, the Colorado FOE monument was prominently displayed at the seat of state, county, and city government. Citizens doing business with any of these three levels of government are thus subject to being confronted with the FOE monument.

The fact that there were more "other monuments" referred to by the Colorado Supreme Court was dictated merely by that court's consideration of a larger geographical context than that considered by the panel majority in the case below. The record contains evidence that, in Elkhart, in addition to the FOE monument and the other two monuments on the Municipal Building lawn, "[t]here are numerous other historical and cultural plaques, memorials, and monuments located south of the entrance of city hall, in the foyer just inside the city hall entrance, and at the second and third floor open areas of city hall." Pet. App. 28a, n.11. The decision below does not explain why these "numerous" other historical and cultural displays both inside and outside the Elkhart Municipal Building were not deemed part of the relevant context.

There is no significant factual or legal distinction between the Elkhart placement and that at issue in *Freedom From Religion*. If anything, the Colorado placement, at the seat of state, county and city government, should be even more offensive under respondents' theory. That case cannot be reconciled with the decision below.

The conflict between the decision below and the decisions from the Tenth Circuit and the Colorado Supreme Court is real, direct and unresolved. This Court should grant review.

II. RESPONDENTS' OPPOSITION UNDERSCORES THE NEED TO CLARIFY THE SCOPE OF *STONE v. GRAHAM*.

This Court's statement in *Stone v. Graham* that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths" hardly constitutes a groundbreaking discovery. 449 U.S. at 41-42. Yet virtually every court to have ruled against a government display of the Decalogue, including the panel majority in this case, appears to have drawn from this statement a presumption of governmental religious purpose strong enough to cause those courts to abandon their usual deference to a government body's articulation of a secular purpose. Pet. at 14. This process is perfectly illustrated by the respondents. Opp. at 10-11. The process goes as follows: (1) *Stone v. Graham* declares the Ten Commandants to be "sacred," i.e., religious; (2) this places the burden on the government to show a secular purpose for displaying them; (3) the government declares its secular purpose is to display the Commandments for their historical, secular or legal significance; (4) but merely asserting the secular and historical significance of the Decalogue is insufficient to overcome its religiosity; (5) the asserted secular purpose must, therefore, be merely a sham.

It is clear that this is a game the government can never win. For how else can the government meet its burden

than by declaring a non-religious purpose for the display? In the absence of clear and convincing evidence that the government is deliberately attempting to circumvent the Establishment Clause, the fact that the Ten Commandments "are undeniably a sacred text" should not be enough to engender suspicion, let alone summary rejection, of an avowed secular purpose.

This Court should intervene to correct the lower courts' recurring misapplication of *Stone*.[2] This Court clearly did not intend *Stone* to be applied in this fashion. Indeed, in *Stone*, this Court suggested that the constitutional problems inherent in the Kentucky statute would disappear if "the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. If, under *Stone*, the Ten Commandments may be used even in the constitutionally sensitive setting of the public school instruction, then there can be no principled reason for reading into *Stone* the kind of irrebuttable presumption of religiosity all too frequently applied by lower courts.

This secular significance of the Ten Commandments is no mere cliche. Indeed it is not at all far-fetched to say that one can trace a line from Sinai to Philadelphia. Sir William Blackstone, the preeminent legal educator of the

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[2] *See, e.g., Doe v. Harlan County School Dist.*, 96 F. Supp. 2d 667, 674 (E.D. Ky. 2000) (citing *Stone v. Graham* for proposition that very nature of Ten Commandments precludes a finding of a prevailing secular purpose); *Adland v. Russ*, 107 F. Supp. 2d 782, 784-85 (E.D. Ky. 2000) (quoting *Doe v. Harlan County* for proposition that nature of Decalogue precludes finding of secular purpose); *ICLU v. O'Bannon*, 110 F. Supp. 2d 842, 851 (S.D. Ind. 2000) (taking *Stone v. Graham* as "starting point" for finding of Establishment Clause violation in display of Ten Commandments monument at State Capitol).

Framers,[3] wrote that all human laws depend upon two foundations: the law of nature and the law of revelation; the doctrines of which "are to be found only in the holy scriptures." BLACKSTONE'S COMMENTARIES, Book I, Sec. 2. More specifically, Blackstone identifies the English King Alfred as the founder of English common law. *Id.*, Book 1, Sec. 3. The Laws of King Alfred start with the Ten Commandments. Harold J. Berman, *Individualistic And Communitarian Theories of Justice: An Historical Approach* 21 U. Cal. Davis L. Rev. 549-575 (1988). *See also*, *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting) (the Ten Commandments, undeniably, "have had a significant impact on the development of secular legal codes of the Western World.")

The Ten Commandments are thus far from being a mere religious text sacred to certain religious groups. Their place in the history of our legal system renders them a powerful symbol of the rule of law. Ignorance of this history should no longer be countenanced nor be permitted to govern constitutional adjudication.

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[3]The founding generation learned its law from Blackstone's *Commentaries on the Laws of England.* Albert Altschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1 (1996). As historian Daniel Boorstin puts it, "In the history of American institutions, no other book —except the Bible — has played so great a role . . ." Daniel J. Boorstin, *The Mysterious Science of the Law* (1958). Another scholar has noted that "all of our formative documents — the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall — were drafted by attorneys steeped in [*Blackstone's Commentaries*]." Robert A. Ferguson, *Law and Letters in American Culture* (1984), quoted in Altschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. at 2. John Marshall had read Blackstone four times by the time he was twenty-seven. *Id.*

III. THE VALIDITY OF "OFFENDED OBSERVER" STANDING IS AN IMPORTANT CONSTITUTIONAL ISSUE MERITING REVIEW

This case also presents the important question whether a litigant can secure Article III standing on the bare plea that the litigant's visual observation of the challenged display is offensive to the litigant. This question is extremely important for a number of reasons.

First, "offended observer" standing is the vehicle for much of the so-called "Grinch" litigation that occupies the federal courts with Establishment Clause challenges to monuments, displays, city seals, official notices, and the like. *See, e.g.*, Opp. at 22-23 (citing cases).

Second, this Court has rejected the notion of "offended observer" standing. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982) (Article III injury requirement not satisfied by the "psychological consequence presumably produced by observation of conduct with which one disagrees"); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) (psychic dissatisfaction not a cognizable Article III injury). Nevertheless, lower courts — such as those cited by respondents — repeatedly circumvent this Court's teaching by claiming that unwelcome visual encounters with allegedly religious displays are constitutionally sufficient for standing. *E.g.*, Opp. at 22-23; Pet. App. at 10a-13a. Indeed, in the case at bar, by holding that both avoidance of contact with an "offensive" display, *id.* at 10a, 13a, and contact with such a display, *id.* at 11a, 13a, alike suffice for standing, the Seventh Circuit has fully embraced "offended observer" standing.

Third, "offended observer" standing has no coherent limits. Such standing subjects all visible, audible, or otherwise perceptible government activity to challenge by passersby.

The tourist who shrinks at the sight of religion-laden inscriptions on national monuments, the audience member who cringes at the sound of religious references in a government official's speech, the Internet surfer who takes offense at religious mottos or symbols on a governmental body's home page — each of these is licensed, if "offended observer" standing is accepted, to secure a federal judicial pronouncement on the Establishment Clause merits of whatever offends the observer's religious (or anti-religious) sensibilities.

Fourth, the question of "offended observer" standing requires clarification from this Court. While this Court has upheld standing in the context of students coercively exposed to school-sponsored religious communications, Pet. at 21,[4] this Court has never directly addressed standing in the context of public observation of governmental displays or other communications. Neither *Lynch v. Donnelly*, 465 U.S. 668 (1984), nor *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), dealt with the standing of the plaintiffs in those cases. *A fortiori*, neither case held that "offended observer" standing was a permissible grounds for standing.[5] Indeed, both the

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[4]The relevant injury in the school context — either coerced participation in a religious exercise, or interference with parental control over a child's religious upbringing — is different in kind from the mere taking of offense at a government activity or display. Hence, no age-based "sliding scale" of standing is necessary to distinguish these cases, contrary to respondents' contention, Opp. at 21. In short, respondents' reliance on school cases, Opp. at 19-20, is unavailing. (Moreover, to the extent that these cases do not even address the standing issue, they have no precedential status on that issue. *See infra* note 5.)

[5]Even if the sole asserted basis for standing in *Lynch* and *Allegheny* had been "offended observer" status, the fact that this Court did not address the standing issue would mean that no precedent for such standing had been set. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (jurisdictional question remains open where not addressed in prior case); *Lewis v. Casey*, 518 U.S.

Lynch and *Allegheny* suits apparently rested on municipal taxpayer standing, *see* Pet. at 21-22, an issue not presented here, *see* Pet. at 6, 19.

The present case squarely and cleanly presents the issue whether "offended observer" status suffices for Article III standing to raise an Establishment Clause challenge. Respondents do <u>not</u> assert taxpayer standing. Pet. at 6, 19.

This Court should grant review to resolve this important and recurrent question of "offended observer" standing under Article III.

343, 352 n.2 (1996) (same); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) (same).

CONCLUSION

For the reasons stated herein this Court should grant review.

Respectfully submitted,

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